F. M. S. REPORTS.

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, J.A.

April 3, 1939.

ARTHANARISAMI CHETTIAR & 2 OTHERS

v.

PUBLIC PROSECUTOR.

[SELANGOR MAGISTRATE'S CRIMINAL APPEALS Nos. 3, 4 & 5 of 1939]

Customs Enactment No. 5 of 1936 & 124 (iv)—principal liable for wrongdoing of agent—but not of the agents' servant—principles of civil liability not applicable.

The first appellant authorised the third appellant under Section 124 of the Customs Enactment to take delivery of imported goods through the Customs. The third appellant in turn similarly authorised the second appellant, who was his clerk. The second appellant made a false declaration in respect of the goods. By Section 124 (iv) of the Enactment, which appears **in extenso** in the judgment, a principal is made liable for the acts of his clerk servant or agent.

Held.—As the subsection is an exception to the general rule in criminal matters that **mens rea** must be proved, its provisions must be strictly interpreted. As no authority was given by the first appellant to the second appellant, the latter was never authorised by the first appellant in the particular manner required under Section 124. The law of agency which appertains to civil contracts cannot be applied for the purpose of establishing criminal liability for an agent's acts without proof of **scienter.**

MAGISTRATE'S CRIMINAL APPEALS.

Roland Braddell (*Ramani* with him) for Appellants.

J. F. Draper, Deputy Public Prosecutor, for Public Prosecutor.

Terrell, J.A.—The second appellant was charged with making a declaration under section 51 of the Customs Enactment No. 5 of 1936, which was incorrect as to the quantity of certain Indian cotton piece goods that were being imported. The declaration was signed in triplicate, Exs. G^1, G^2 & G^3. The Bill of Lading for the goods, Ex. H, had been indorsed over by the consignee T.K.S. Venkatarama Chettiar in favour of the 1st appellant, J.S.P. Arthanarisami Chettiar, and the declaration was signed as follows:—

"For J.S.P. Arthanarisami Chettiar
Mustan
Importer or Agents.

The words "Importer or" being struck out.

The 3rd appellant, Ramaiah, acted as importers' agent for various people, and the 2nd appellant was his clerk.

When the documents in respect of the goods in question were presented to Mr. Evans of the Customs Department on the 26th August 1938, the department had in their possession two letters of authority under section 124 of the Customs Enactment. Both letters of authority appear to have been signed in the previous March, and were put in as Exhibits M and S.

Ex. M is an authority from Ramaiah, the 3rd appellant, in favour in his clerk Mustan, the 2nd appellant, under section 124 (iii) of the Enactment. Ex. S is an authority from the 1st appellant as principal of the firm of K.T. Nagaraja Chettiar in favour of Ramaiah under section 134 (i) of the Enactment.

When the documents were presented, Mr. Evans was not satisfied that the authority was sufficient, as the consignee was not the 1st appellant's firm but the 1st appellant personally. Accordingly he required a further authority which was given shortly afterwards, Ex. L. This is an authority by the 1st appellant in favour of the 3rd appellant.

The 2nd appellant having signed the declaration which was admittedly incorrect, had, of course, no defence to the first charge brought against him, the prohibition in the Statute being absolute and no question of *mens rea* arising. He accordingly pleaded guilty and was convicted and fined. The 1st and 3rd appellants were charged in respect of the same declaration under the provisions of section 124 (iv) of the Enactment which reads as follows:—

> "(iv) Where any person would be liable under this Enactment to any punishment, penalty or forfeiture for any act, omission, neglect or default he shall be liable to the same punishment, penalty or forfeiture for every such act, omission, neglect or default of any clerk, servant or agent authorized by him under this section if such act, omission, neglect or default is committed in the course of the employment as authorized clerk, agent or servant."

It will be seen that by the express provisions of the Enactment a person may be criminally liable for the acts of his servant as agent. As this is a provision which is an exception to the general rule in criminal matters that *mens rea* must be proved it is clear that such a provision should be strictly interpreted. In this particular transaction, the Customs Officer required, as he was entitled to require under section 124 (i) of the Enactment, a written authority. It is true that he need not have required an authority in writing, but in fact he did require it, and as no written authority in

favour of the 2nd appellant was ever given, it follows that the 2nd appellant was never authorised by the 1st appellant under section 124 in the particular manner in which the Customs officer required him to be authorised. The learned Deputy Public Prosecutor argued that the principles of agency as set out in the Contract Enactment applied. I need only observe that the law of agency which appertains to civil contracts cannot be applied for the purpose of establishing a criminal liability for an agent's acts without proof of *scienter*. The 1st appellant's appeal must, therefore, be allowed, the conviction quashed, and the fine repaid.

The third appellant is, I think, in a different position. By virtue of Ex. M he is responsible for the acts of his clerk. His appeal on the first charge against him is therefore dismissed.

The second appellant was also charged with and convicted of being concerned in a fraudulent attempt at evasion of a customs duty and the 3rd appellant was charged with and convicted of abetting the second appellant's offence. It was originally one of the grounds of appeal in the 3rd appellant's petition that a person cannot abet an attempt, but on the appeal no argument was addressed to me in support thereof. I would point out that an offence under section 114 (i) (b) of the Customs Enactment is quite different to an offence under the Penal Code. Under the latter the offence of abetment is not committed unless the principal offence is established. Under section 114 (i) (b) of the Customs Enactment, a person can be found guilty if he is proved to have been knowingly concerned in any fraudulent evasion of Customs Duty. It is not necessary, therefore, to establish a fraudulent evasion by one person, and abetment by others. Every person concerned in the fraudulent evasion is liable under the subsection, and no allegation of abetment is necessary.

These considerations have particular relevance in the present case, in view of the fact that Mr. Braddell, on behalf of the appellants, directed the greater part of his very able argument to establishing from the Record that the evidence of T.K.S., the original consignee of the goods, was contradictory and unworthy of belief, and that the learned Magistrate had misdirected himself in accepting it, the inference being that T.K.S. who was the person likely to benefit from the incorrect declaration, was almost certainly the prime mover in the fraudulent evasion of the Customs Duty. T.K.S. was originally charged with the same offence as the 2nd and 3rd appellants, but at an early stage of the proceedings the prosecution against him was withdrawn by the Public Prosecutor, and he was called as a witness for the prosecution. The learned Magistrate, therefore, was never under any obligation to consider whether or not T.K.S. was also guilty of the offence with which the 2nd and 3rd appellants were charged. It is true that there were many points in the evidence of T.K.S. which were contradictory and incredible, and if the learned Magistrate had based his convictions of the appellants on the evidence of this witness there might have been good ground for allowing the appeals. I cannot find, however, that the learned Magistrate accepted T.K.S. as a witness of truth. He never says so in his grounds of Judgment. Where, however, the evidence of T.K.S. is consistent with other evidence upon which the learned Magistrate was entitled to rely, there can be no objection to his having accepted the evidence of T.K.S. in corroboration of other facts which had been proved *aliunde*.

The gist of the case against the 2nd and 3rd appellants is that the 2nd appellant signed the declaration Ex. G, showing 2686 yards of material, when he had in his possession a certificate of origin, Ex. A, which showed that the real length was 3872 yards. T.K.S. says that he left at the 3rd appellant's office, the Bill of Lading, Ex. H, the Certificate of Origin Ex. A, and an invoice from his consignor which has never been discovered. The documents produced by the 2nd appellant to the Customs officer were the Bill of Lading, the Import Declaration Ex. G, and an invoice Ex. J which supported Ex. G but showed as the consignors a firm, G.V. Rajamani Row, who apparently had nothing to do with the consignment in question. The prosecution alleges that Ex. J was prepared by the 2nd and 3rd appellants with a fraudulent intention. As I have said it is quite unnecessary to come to a decision whether Ex. J was prepared by these appellants, or by T.K.S. or by all three of them in connivance. If the appellants had Ex. A in their possession they must have been aware that Ex. G contained a false statement, and the evidence in support of this is that Mr. Jeavons found it in the 3rd appellant's office in the same day that Ex. G was signed. It was suggested that Mr. Jeavons must have been mistaken, that he collected papers on the same day both from the 3rd appellant's shop and from T.K.S's. office in Kuala Lumpur and that they may have got muddled up. I quite agree that it is highly desirable that when a Customs Officer makes a search, he should immediately prepare a schedule of what he has found, and as, in the course of the hearing, I indicated this opinion to the learned Deputy Public Prosecutor, I have every confidence that this course will

be followed in the future. In the present case, however, Mr. Jeavons has sworn on oath that he kept the documents separate, and is positive that Ex. A was found in the 3rd appellant's shop. This evidence was accepted by the learned Magistrate, and it would be contrary to every principle for an appellate Court to question such a finding.

A point which was strongly urged on behalf of the appellants was that they had no motive for committing an offence which would benefit themselves but T.K.S. The learned Deputy Public Prosecutor suggested several motives which did not appear to me to be very convincing. It is, however, unnecessary to prove any motive if the commission of the offence has been established beyond reasonable doubt, and I would only add that the mere fact that no motive has been established by no means proves that no motive existed.

The appeals of the 2nd and 3rd appellants against the convictions on the 2nd charges must therefore be dismissed, and the convictions and sentences confirmed.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) & GORDON-SMITH, Ag. J.A.

November 24, 1939.

SHEIKH HASSAN BIN SHEIKH IBRAHIM
v.
PUBLIC PROSECUTOR.

[NEGRI SEMBILAN CRIMINAL APPEAL No. 10 of 1939]

Penal Code, Ss. 409, 477A—criminal breach of trust—falisfication of accounts—series of offences connected with each other—"same transaction"—joinder of charges—Criminal Procedure Code, Ss. 151, 153 (2), 163, 165.

The appellant was charged with criminal breach of trust in respect of $23/- paid to him on 23 separate occasions within the space of a year. To this charge were appended particulars of the persons from whom the payments were made. The second charge alleged that with intent to defraud he committed falsifications of accounts by wilfully omitting to enter the twenty-three payments in his cash book. At the trial a third charge was added of omitting to enter in the certificate books particulars of the twenty-three marriages and divorces in respect of which the $23/- were received. The appellant was convicted on the first charge and acquitted on the other two.

Held, on appeal to the Court of Appeal, that the first charge was really of a general deficiency of $23/-, the particulars being not so much particulars of separate misappropriations as indications as to how the deficit was arrived at and was a good charge under Section 153 (2) of the Criminal Procedure Code.

Held further, that the criminal breach of trust charged was one offence though made up of twenty-three items and that when the falsifications charged were confined to those items, the criminal breach of trust and the falsifications were so closely inter-related that the twenty-three falsifications became a single offence like the twenty-three breaches of trust which formed a single offence and that the falsifications were related to the criminal breach of trust items by community of purpose and they stood to one another in the relationship of cause and effect; hence the two charges were properly joined.

Cases referred to:—

(1) *Powell and wife v. Streatham Manor Nursing Home,* (1935) A.C. 243.

(2) *R. v. Sakandar Khan,* 8 M.L.J. 123.

F. A. Briggs for the appellant submitted on behalf of the accused that although on the charge of criminal breach of trust a gross deficiency could be charged under Section 153 (ii) of the Criminal Procedure Code, this special power did not apply in the case of charges of falsification of accounts, and that, as the second and third charges had been improper in this respect, there was an illegal misjoinder of charges and, although the accused was acquitted on the charges of falsification, the trial as a whole was therefore illegal.

The Court of Appeal held that, as under Section 153 (ii) the defalcation was to be regarded as a single offence in respect of the gross sum missing, so also all improper items or omissions in the accounts, which came into existence for the purpose of effecting or concealing that defalcation, must be deemed together to constitute one offence of falsification. No relevant authorities appear to exist on the point.

A. J. Grattan-Bellew, Deputy Public Prosecutor for Public Prosecutor. There was some corroboration of the evidence of the appellant's clerk and as the learned trial Judge, who had seen and heard the witnesses had rejected the evidence of the appellant and accepted that of his clerk, this finding of fact should not be upset—*Powell and wife v. Streatham Manor Nursing Home*[1] at page 249 *et seq.*

Although the Criminal Breach of Trust in fact consisted of 23 offences and the falsifications of accounts consisted of 46 offences, nevertheless there was in reality only one transaction namely a general design to defraud the Government and the falsifications of accounts were a series of acts in the transaction and done for the purpose of concealing the fraud; consequently by virtue of sections 153 (ii) and 165 (i) of the Criminal Procedure Code (Cap. 6) the joinder was proper.